RECORD AND BRIEFS

FILED
SEP 22 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 16-980

In the Supreme Court of the United States

JON HUSTED, OHIO SECRETARY OF STATE,

Petitioner,

v.

A. PHILIP RANDOLPH INSTITUTE, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF CURRENT AND FORMER OHIO ELECTIONS OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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September 22, 2017

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IDENTITY AND INTERESTS OF *AMICI CURIAE*[1]

Amici curiae are current and former elections officials from various counties across the State of Ohio.[2] Their goal as elections officials is to ensure that their county's voter registration list is as up-to-date and accurate as possible, and that every eligible voter has the opportunity to cast her vote. They submit this brief to highlight the ways in which the Supplemental Process adopted by Ohio's Secretary of State thwarts these goals. The Supplemental Process is incompatible with Ohio's election scheme and ultimately results in the disenfranchisement of thousands of eligible Ohio voters.

A list of the 36 individuals participating as *amici* appears in an appendix to this brief.

SUMMARY OF ARGUMENT

Amici, current and former Ohio elections officials, seek to ensure that Ohio's voter rolls are as up-to-date and accurate as possible. Ohio's Supplemental Process is antithetical to that goal. It results in the elimination of voters from the rolls who are, in fact, eligible to vote. And it targets for elimination from the rolls those people who simply choose not to vote.

The National Voter Registration Act (NVRA) authorizes elections officials to update the rolls when voters move. But the statute expressly forbids elections officials

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amici*, their members, or their counsel, made any monetary contribution to its preparation or submission. All parties in this case have filed letters with the Clerk granting blanket consent to the filing of *amicus curiae* briefs.

[2] *Amici* join this brief in their individual capacities, not on behalf of their respective county boards of election.

from removing voters for not voting. As the statute contemplates, the failure to cast a vote in every election should not disqualify a voter. *See* 52 U.S.C. § 20507(b)(2) (prohibiting "[a]ny State program or activity" that "result[s] in the removal ... of any person from the official list of voters registered to vote ... by reason of the person's failure to vote").

Paying little heed to this restriction, Ohio's Supplemental Process purges registered voters who are still eligible to vote. It eliminates both people who have never moved and those who have moved within the State (or even within their county). Yet Ohio law ensures that voters who move within the State remain eligible to vote. Ignoring this critical component of Ohio law, the petitioner eliminates them from the rolls even though they can still lawfully appear at their polling place and cast a ballot under Ohio's portable voter-registration system. These voters have the right to choose when to vote, and to choose not to vote, without jeopardizing their eligibility.

Ohio elections officials implement other mechanisms that do in fact protect against ineligible voters staying on the rolls, while at the same time ensuring that eligible voters remain registered. And, if the State wanted to further increase the accuracy of the voting rolls, there are other more targeted measures that could be adopted without disenfranchising duly registered Ohioans. By contrast, abstaining from casting a ballot has nothing to do with an Ohio voter's eligibility to vote. This Court should respect Congress's decision to forbid Ohio from purging infrequent voters and affirm the decision below.

ARGUMENT

I. The Secretary of State's Supplemental Process improperly presumes that voters who do not vote are ineligible.

A. The touchstone of the National Voter Registration Act's list-maintenance process is the voter's eligibility to vote. The NVRA authorizes the States to adopt a program "to remove ... *ineligible voters*" from the rolls by reason of "a change in the residence of the registrant." 52 U.S.C. § 20507(a)(4) (emphasis added). "[O]ne of the guiding principles of this legislation [is] to ensure that once registered, a voter remains on the rolls so long as he or she is *eligible to vote* in that jurisdiction." S. Rep. No. 103-6, at 19 (1993) (emphasis added).

Congress appreciated that a failure to vote does not indicate ineligibility to vote when it forbade States from purging voters because of "the person's failure to vote." 52 U.S.C. § 20507(b)(2). After all, recent experience shows that voting turnout even for presidential elections remains low across the country, and that percentage dips even further for mid-term elections. *See infra* at 5. If consistent voting were a requirement for maintaining eligibility, a large percentage of the country would face disenfranchisement.

Ohio's Secretary of State, however, sees infrequent voting as an opportunity to thin the voting rolls: if a voter does not vote, then she is presumed to be ineligible. The Supplemental Process is triggered solely by the voter's failure to vote for approximately two years. Through the purge system embodied in the Supplemental Process, Ohio purges voters who have not recently voted unless they respond to a confirmation notice or vote within the next four years.

But people neglect to respond to the confirmation notice for myriad reasons. Because most mail nowadays is either junk mail or bills, people may discard anything that does not look like a bill without reading it. The Supplemental Process should not exploit a common lack of attentiveness to mailed notices.

Moreover, Ohio's purge system is built upon a series of false premises. People may not respond to a confirmation notice if they have moved within the State—but in Ohio, moving within the State does not render one ineligible. The Supplemental Process treats not voting as a proxy for moving and assumes that moving renders the voter ineligible. As the petitioner states, the Supplemental Process "seeks to identify electors whose lack of voter activity indicates they may have moved, even though their names did not appear" in the change-of-address database. Pet. Br. at 10-11 (quoting *Brunner Directive 2009-05*). The petitioner thus takes for granted that a voter becomes ineligible to vote when she moves.

That does not reflect the reality of Ohio's voting framework. Under Ohio's portable voter-registration system, voters remain eligible to vote when they move within the State. And thus they should not be purged for moving to another county. According to the petitioner's own directives, ballots must be counted if the voter is registered anywhere in Ohio. Ohio Sec'y of State, *Provisional Voting: Directive 2015-28*, at 6-14–6-17 (Dec. 15, 2015), https://www.sos.state.oh.us/globalassets/elections/directives/2015/dir2015-28_eom-ch_06a.pdf.[3] Specifically, a voter who moves within the State may go to her new

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[3] *See also* Ohio Rev. Code § 3505.183(B)(3); Ohio Sec'y of State, *Ohio Election Official Manual*, at 6-14 (Aug. 8, 2017), https://www.sos.state.oh.us/globalassets/elections/directives/2017/dir2017-10_eom.pdf.

polling place and cast a provisional ballot. Provisional ballots cast in the correct polling place count as long as the person is registered to vote anywhere in the State.

In short, moving should only trigger removal from the rolls if a voter moves out of state because moving within the State does not render an Ohio voter ineligible to vote. The Supplemental Process, however, sets in motion a purge of these voters absent affirmative voter action.

B. While Ohio's Secretary of State wields voter inactivity as a proxy for ineligibility, there is a much simpler and more likely explanation: the voter has simply chosen not to vote, which is a right all eligible voters enjoy. Additionally, transportation difficulties, work schedules, health problems, family needs, domestic violence, voter intimidation, and other obstacles may impede one's ability to make it to the polls. As is widely reported, many eligible voters don't vote, even in relatively high turnout presidential elections. There are low voter turnout rates around the country, including in Ohio—for instance, four out of ten eligible voters stayed home in 2016, and six out of ten stayed home in 2014.[4]

Some groups vote at even lower rates. Young people and citizens of Hispanic or Asian-American/Pacific Islander descent have voting rates five to twenty percentage points below those of black or white voters.[5] The quintessential example of low-turnout voters are young people aged 18-29, who voted at rates less than 50% in 2016 and less than 20% in 2014.[6] And because young

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[4] US Elections Project & Nonprofit VOTE, *America Goes to the Polls 2016*, 6, 9, http://www.nonprofitvote.org/documents/2017/03/america-goes-polls-2016.pdf (last visited September 22, 2017).

[5] *See id.* at 15-17.

[6] US Elections Project, *Voter Turnout Demographics*, http://www.electproject.org/home/voter-turnout/demographics (last

people may move more frequently than other voters, they are less likely to receive a confirmation notice (which is sent to an old address). Yet, if they've only moved within the State, they remain eligible to vote. Thus, under Ohio's Supplemental Process, young people are especially vulnerable to elimination from the rolls.

The pervasive impact of systematically disenfranchising youth and other historically low-turnout groups can be readily imagined. Congress wisely prohibited the States from using failure to vote as grounds for eliminating voters from the rolls. But the Supplemental Process does just that.

II. Ohio's Supplemental Process disenfranchises thousands of eligible Ohio voters.

A. The effects on the administration of Ohio's elections—not to mention the potential effects on election outcomes—are not merely hypothetical. In the November 2016 election, at least 7,515 eligible Ohio voters came to the polls at the precinct where they had registered but were forced to vote provisionally simply because they fell victim to the petitioner's purge efforts. These voters came to the polls rightfully expecting that they remained eligible and registered to vote. Yet they had been purged merely because it had been several years since they had last chosen to vote. The Court in this case ordered Ohio to count the ballots of those 7,515 eligible Ohio voters. *See* Pet. App. at 94a-100a; Pet. Br. at 14. But without that court order, these 7,515 people would have been disenfranchised.

As elections officials, we also know that this number vastly underestimates the number of voters wrongfully purged, as it only accounts for the limited subset who

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visited September 22, 2017).

showed up to the polls in the last election in the same precinct where they were registered, and tried to cast a ballot in person. We observe individuals who become frustrated, embarrassed, or confused based on questions about their eligibility and simply walk away from the polls. Nor does it account for the lengthier lines occasioned by poll workers trying to sort out these matters or the back-up caused by purged voters having to cast provisional ballots—those lines may dissuade others from voting.

Indeed, these 7,515 voters are only the tip of the iceberg. According to the U.S. Election Assistance Commission Election Day Survey, in the 2015-2016 period, Ohio purged 426,781 voters who failed to respond to the confirmation notice for voter inactivity.[7] From 2011-2014, Ohio purged 846,391 voters for the same reason.[8] Ohio also purged 384,451 voters in the 2015-2016 period and 480,957 Ohio voters in the 2011-2014 period for moving—even though, as discussed above, Ohio voters remain eligible to cast a provisional ballot so long as they move within the State of Ohio.[9]

Many of these voters remain eligible to vote and should be entitled to show up and exercise that right

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[7] U.S. EAC, *The Election Administration and Voting Survey, 2016 Comprehensive Report*, 98, https://www.eac.gov/assets/1/6/2016_EAVS_Comprehensive_Report.pdf (last visited September 22, 2017).

[8] U.S. EAC, *The 2014 EAC Election Administration and Voting Survey Comprehensive Report*, 106, https://www.eac.gov/assets/1/1/2014_EAC_EAVS_Comprehensive_Report_508_Compliant.pdf (last visited September 22, 2017); *see also* U.S. EAC, *The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office 2011-2012*, 67, https://www.eac.gov/assets/1/28/EAC_NVRA%20Report_lowres.pdf (last visited September 22, 2017).

[9] U.S. EAC, *2016 Comprehensive Report*, at 98.

when they choose to do so. For all the Secretary of State's platitudes about ensuring eligibility, the true effects of the Supplemental Process are impossible to mask.

The Supplemental Process disenfranchises voters in other ways as well. Voters purged from the rolls become ineligible to sign ballot initiatives or candidate petitions. Ohio Rev. Code §§ 3501.38, 3519.10. Their signatures on ballot initiatives do not count (often unbeknownst to the person signing and the group seeking the signature), thereby jeopardizing the ballot initiative or the eligibility of candidates relying on these signatures. In addition, the Secretary of State sends applications for absentee ballots to registered voters but omits individuals who haven't voted in the past four years. *See*, e.g., Ohio Sec'y of State, *Directive 2016-18*, at 1 (July 8, 2016), https://www.sos.state.oh.us/globalassets/elections/directives/2016/dir2016-18.pdf.

It does not take too much imagination to appreciate the impact of even the elimination of 7,500 votes. As the Secretary of State notes on his website, 112 Ohio elections have been decided by a single vote or were tied in approximately the past three years. *See* Press Release, Ohio Sec'y of State, Secretary Husted: One Vote Can Make A Difference (Dec. 16 2016), https://www.sos.state.oh.us/media-center/press-releases/2016/2016-12-16/#gref. And recent national elections have turned on the results in just a handful of States, with some States having razor-thin margins (think Florida in 2000). Eliminating these seven thousand votes (not to mention the many more purged in Ohio) has the potential to turn the tide in a national election, independent of its ramifications on state and local contests.

B. If the petitioner's true goal is ensuring accuracy and eligibility, better alternative mechanisms exist for

keeping the rolls as up-to-date and accurate as possible. Ohio already has in place far-reaching processes for maintaining up-to-date and accurate voter rolls without the Supplemental Process.

Beyond the Supplemental Process, Ohio has another mechanism for updating its rolls: the National Change-of-Address (NCOA) Process. The NCOA Process is triggered when a voter record in the United States Postal Service database indicates that the voter likely has moved. Ohio Rev. Code § 3503.21(B)(1); Ohio Sec'y of State, *Directive 2015-09* (May 19, 2015), https://www.sos.state.oh.us/globalassets/elections/directives/2015/dir2015-09.pdf

Ohio's NCOA Process itself sweeps broadly. When Ohio elections officials learn through the NCOA process that a voter has moved within her county, Ohio automatically updates the voter's registration with her new address and does not purge the voter simply because she has moved. Ohio Sec'y of State, *Directive 2017-03*, at 2–4 (Feb. 10, 2017), https://www.sos.state.oh.us/globalassets/elections/directives/2017/dir2017-03.pdf.[10] For voters moving to another Ohio county, however, the Secretary of State sends a confirmation notice with the voter's old address and asking the voter to confirm that old address or provide a new address—even though the State was just notified of the voter's new address.[11] If the out-of-county voter does not respond to the confirmation notice sent to her old address, or vote in four years, she is removed from the rolls. *Id.* at 7. (As is appropriate, those

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[10] *See also* Ohio Sec'y of State, *In County Confirmation Notice*, https://www.sos.state.oh.us/globalassets/elections/forms/10-s-2.pdf (last visited September 22, 2017).

[11] *See also* Ohio Sec'y of State, *Confirmation Notice*, https://www.sos.state.oh.us/globalassets/elections/forms/10-s-1.pdf (last visited September 22, 2017).

voters that have changed their address with the Post Office to an out-of-state address, or have not provided any forwarding address, are also purged if they are inactive and do no confirm their address.) The Secretary of State could better maintain the voter rolls by simply updating the addresses for voters moving to another Ohio county, just like he does for intracounty moves. As noted above, just like voters who move within a county, voters who move within the State are still eligible to vote. So if the Secretary of State learns from the NCOA process that a voter has moved within the State, he could update that person's registration in the voter rolls too.

Amici, with a front-row view of the inner-workings of election procedures in Ohio, have followed other state mandates to ensure that every eligible voter has the chance to cast a vote. For example, local elections officials remove voters from the rolls based on reports of deaths from county health departments and reports on felony convictions from county courts and the Department of Rehabilitation and Corrections. They receive data from these and other governmental agencies and compare it to their voting rolls.

In addition, the Secretary of State's office collects and uses change of address information from government agencies to update voter addresses. In accordance with the NVRA, the Ohio Bureau of Motor Vehicles (BMV) sends the petitioner all records of those who update their address with the BMV unless those individuals explicitly indicate that they do not want that information to be transferred. *See* 52 U.S.C. §§ 20504(d), 20507(f). The NVRA similarly requires state public assistance and disability agencies to distribute a voter-registration form "with each ... change of address form," 52 U.S.C. § 20506(a)(6)(A). As with BMV records, the State could automatically update the voter registration of any person who changes her address with public assistance,

veterans' services, and disability agencies. Adopting such measures would further ensure that the rolls are up-to-date and accurate.

The Secretary of State could also use the online voter registration system to improve the completeness and accuracy of the rolls. The online system requires registrants to use an Ohio driver's license or state ID and their social security number. If the voter's address on her ID does not match the current address she seeks to use for voter registration, she is told she cannot use the online system. The petitioner could instead redirect these voters to the BMV website with instructions to update their address. This kind of guidance would result in a more complete and accurate voter roll without eliminating voters based on their failure to vote.

These are but a few examples of ways that the petitioner could improve the accuracy of the voting rolls if he shares our goal of ensuring that Ohio's voter rolls are current and accurate. But instead of adopting these means to keep the rolls most current, he has pursued a process that eliminates duly registered voters, including voters who have never moved, and those who have moved within state lines and remain eligible to cast a ballot under Ohio's laws. To protect the franchise, the NVRA allows States to adopt cancellation procedures that target only "ineligible" voters. But the Supplemental Process instead purges many *eligible* voters simply for failing to vote and undermines the integrity of our electoral system.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the U.S. Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX A

Amici curiae are current and former elections officials from various counties across the State of Ohio. Their affiliations are noted for identification purposes only.

Tim Burke,
Hamilton County Board of Elections Chair

Janet Carson,
Geauga County Board of Elections Member

Doris Adams,
Greene County Board of Elections Member

Reba Borchers,
Knox County Board of Elections Member

Jocelyn Bucaro,
Butler County Board of Elections Deputy Director

Frank Cloud,
Butler County Board of Elections Chair

Judith Craig,
Fayette County Board of Elections Member

Brad Cromes,
Portage County Board of Elections Deputy Director (former)

Paul Duggan,
Williams County Board of Elections Chair

Glenda Enders,
Portage County Board of Elections Director (former)

Caleb Faux,
Hamilton County Board of Elections Member

Anthony Giardini,
Lorain County Board of Elections Member

Adam Gilson,
Knox County Board of Elections Member

Bethe Goldenfield,
Warren County Chair and Board of Elections Member

Sarah Greathouse,
Montgomery County Board of Elections Member

Amy Grubbe,
Erie County Board of Elections Member (former)

Ed Helvey,
Delaware County Board of Elections Member

Joshua Hughes,
Lucas County Board of Elections Member

Gary Johnson,
Lucas County Board of Elections Member (former)

Raymond Lembke,
Clermont County Board of Elections Member

Dennis A Lieberman,
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Linda Marcial,
Portage County Board of Elections Director (former)

Rhine McLin,
Montgomery County Board of Elections Chair

Lynn Mitchell,
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Patricia Nelson,
Portage County Board of Elections Member

William D. Rich,
Summit County Board of Elections Member

Michael Sexton,
Franklin County Board of Elections Member

William C. Steele,
Union County Board of Elections Chair

Craig Stephens,
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Linda Stutz,
Van Wert County Board of Elections Director

Thomas Tagliamonte,
Lake County Board of Elections Member

Paula Watson,
Ashland County Board of Elections Member

Brenda Weaver,
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Kathleen D. Wyenandt,
Butler County Board of Elections Member

Jeanne Zeigler,
Van Wert County Board of Elections Member

Mike Zickar,
Wood County Board of Elections Member